

EXHIBIT 2

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Defendants PHARRELL WILLIAMS,
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HARRIS, JR. and Counter-Defendants
MORE WATER FROM NAZARETH
PUBLISHING, INC., PAULA MAXINE
PATTON individually and d/b/a
HADDINGTON MUSIC, STAR TRAK
ENTERTAINMENT, GEFEN
RECORDS, INTERSCOPE RECORDS,
UMG RECORDINGS, INC., and
UNIVERSAL MUSIC DISTRIBUTION

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA, WESTERN DIVISION

PHARRELL WILLIAMS, an
individual; ROBIN THICKE, an
individual; and CLIFFORD HARRIS,
JR., an individual,

Plaintiffs,

vs.

BRIDGEPORT MUSIC, INC., a
Michigan corporation; FRANKIE
CHRISTIAN GAYE, an individual;
MARVIN GAYE III, an individual;
NONA MARVISA GAYE, an
individual; and DOES 1 through 10,
inclusive,

Defendants.

AND RELATED COUNTERCLAIMS.

CASE NO. CV13-06004-JAK (AGRx)
Hon. John A. Kronstadt, Ctrm 750

**JOINT [PROPOSED] JURY
INSTRUCTIONS**

Final Pretrial Conference:

Date: January 26, 2015
Time: 3:00 p.m.
Ctrm.: 750

Jury Trial:

Date: February 10, 2015
Time: 9:00 a.m.
Ctrm.: 750

Action Commenced: August 15, 2013

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1 Defendants' contentions:

2 This instruction represents an accurate statement of the law. The jury must
3 understand the concept of joint and several liability in a copyright case, and that a
4 party is responsible for distributing infringing material even if it did not create the
5 work or know that it was infringing. Otherwise, the jury might believe that a
6 distributor or publisher who was not involved in the creation of the song should not
7 be held financially responsible.

8 **Tab 20:**

9 Plaintiffs' contentions: The parties' respective instructions on infringer's
10 profits (MCJI § 17.24) are similar other than naming conventions for the parties
11 ("Counter-Claimants" as opposed to "Gaye Parties" etc.).

12 In addition, the cases cited by Plaintiffs make clear that it is a rare instance
13 where all profits are attributable to the infringement. When all of the profits do not
14 clearly derive from the infringing material, the copyright owner is not entitled to
15 recover all of the profits, and apportionment of just those profits attributable to the
16 infringing material is required. *Three Boys*, 212 F.2d at 487 (citing cases); *Frank*
17 *Music Corp. v Metro-Goldwyn-Mayer Inc.*, 886 F.2d 1545, 1548-49 (9th Cir. 1989);
18 *Cream Records, Inc. v. Jos. Schlitz Brewing Co.*, 754 F.2d 826, 828-29 (9th Cir.
19 1985) ("In cases such as this where an infringer's profits are not entirely due to the
20 infringement, and the evidence suggests some division which may rationally be used
21 as a springboard it is the duty of the court to make some apportionment")(quoting
22 *Orgel v. Clark Boardman Co.*, 301 F.2d 119, 121 (2d Cir. 1962)).

23 The last paragraph of Plaintiffs' instruction states that unless the jury finds
24 that all profits are attributable to the infringement, the jury must apportion damages.
25 Defendants' instruction states this concept in the reverse order. Plaintiffs' cite
26 authorities in their instruction that support their wording, *i.e.*, since it is the rare case
27 where all profits are recoverable.

28 / / /

1 Defendants’ contentions:

2 The Gayes object to Proposed Court’s Instruction No. 17.24 as an incorrect
3 statement of the law. First, Proposed Court’s Instruction No. 17.24 incorrectly
4 states that Plaintiffs and Counter-Defendants’ are entitled to deduct overhead
5 expenses from the damages owed the Gayes. First, overhead expenses are
6 deductible only where the overhead in question contributed to sales of the infringing
7 product. *Kamar Int’l, Inc. v. Russ Berrie & Co.*, 752 F.2d 1326, 1331-32 (9th Cir.
8 1984). Additionally, the facts will show that Plaintiffs and Counter-Defendants’
9 action were willful. A willful copyright infringer is not entitled to a deduction of
10 overhead expenses. *Frank Music Corp. v. Metro-Goldwyn-Mayer, Inc.*, 772 F.2d
11 505, 515 (9th Cir. 1985).

12 Additionally, this instruction misstates the burden in proving the profits
13 attributable to the infringement by attempting to put the burden on the Gayes to
14 prove what portion of Plaintiffs and Counter-Defendants’ profits are attributable to
15 the infringement. The burden on the Gayes is solely to prove revenue. The burden
16 then shifts to the Plaintiffs and Counter-Defendant to prove by a preponderance of
17 the evidence any deductions. *See Oracle Corp. v. SAP AG*, 765 F.3d 1081, 1087
18 (9th Cir. 2014); *Blizzard Entm’t, Inc. v. Reeves*, 2010 WL 4054095, at *1 (C.D. Cal.
19 Aug. 10, 2010). The Gayes’ Proposed Court’s Instruction No. 44 correctly sets
20 forth this methodology.

21 **Tab 21:**

22 Plaintiffs’ contentions: Defendants’ instruction is unsupported by its cited
23 authorities and is not a correct statement of the law here. Plaintiffs contend that
24 apportionment is required here both because: (a) at most, the allegedly copied
25 portions of Defendants’ compositions are only a fraction of Plaintiffs’ works; and
26 (b) other factors, such as extensive marketing and promotion, the fame and fan base
27 of Robin Thicke and Pharrell Williams, etc., contributed to the success of “Blurred
28 Lines.” Accordingly, even were the jury to find that the allegedly copied portions of

1 “Got to Give It Up” are “inextricably intertwined” with “Blurred Lines,” the jury
2 would still need to consider apportionment on the basis of other, non-musical
3 factors. Defendants’ proposed instruction is erroneous and should be rejected.

4 Defendants’ contentions:

5 This instruction represents an accurate statement of the law. The jury must
6 understand the concept of the “inextricably” intertwined infringing “product” for
7 purposes of apportioning damages, and that the infringer must disgorge all profits if
8 the infringing and noninfringing elements are so inextricably intertwined that they
9 may not be reasonably separated. As set forth in the citations to the jury instruction,
10 this is a basic tenet of a damages analysis in a copyright infringement action and a
11 jury must be so instructed.

12 Tab 22:

13 Plaintiffs’ contentions: Plaintiffs’ proposed instruction is a straightforward
14 recitation of MCJI § 17.27. It is not objectionable and should be given as written.
15 Defendants’ proposed instruction has a number of problems (apart from the issue in
16 many of these instructions of naming conventions for the parties, “Gaye Parties” as
17 opposed to “Counter-Claimants”). The entire last paragraph of Defendants’
18 instruction should be rejected. The first sentence is redundant, informal, and
19 purports to summarize the more detailed Model Instruction in the preceding
20 paragraph. The second sentence is not a correct statement of the law. There is no
21 *per se* rule that continuing to infringe after being notified of the infringement
22 constitutes willful infringement, particularly where, as here, Plaintiffs deny that their
23 songs infringe Defendants’ compositions. The case relied upon by Defendants
24 involved a license that had expired—*i.e.*, and thus the Defendant had no argument
25 that it had right to continue exploiting the work. *See Peer Int’l Corp. v. Pausa*
26 *Records, Inc.*, 909 F.2d 1332, 1335-35 (9th Cir. 1990). Here, there is no such issue.
27 There is a dispute over whether the songs are the same (or even close). The last
28 sentence of Defendants’ instruction is off-topic and concerns deduction of overhead,

1 which is dealt with in separate instructions on damages and is simply confusing,
2 redundant, and argumentative when included in the instruction on willfulness.

3 Defendants' contentions:

4 The Gayes object to Proposed Court's Instruction No. 17.27 as being
5 incomplete. The Gayes' Proposed Court's Instruction No. 46 sets forth a complete
6 definition of willful infringement under Ninth Circuit precedent. See *Three Boys*
7 *Music Corp. v. Bolton*, 212 F.3d 477, 487 (9th Cir. 2000)); *Peer Int'l Corp. v. Pausa*
8 *Records, Inc.*, 909 F.2d 1332, 1335-36 (9th Cir. 1990) ("The court found the
9 infringements were willful because of 'Mr. Newman's deposition testimony that
10 defendants received the December 26, 1984 notice of termination, failed to account
11 for and pay royalties, yet nevertheless continued to manufacture and distribute
12 phonorecords.'"); *Frank Music Corp. v. Metro-Goldwyn-Mayer, Inc.*, 772 F.2d 505,
13 515 (9th Cir. 1985); *Kamar Int'l, Inc. v. Russ Berrie & Co.*, 752 F.2d 1326, 1331-32
14 (9th Cir. 1984).

15 **Tab 23:**

16 Plaintiffs' contentions: Defendants' proposed separate instructions on
17 portions of the statutory damages analysis are specially drafted yet more confusing
18 and less comprehensible than the standard instruction, MCJI § 17.25. MCJI § 17.25
19 is part of the agreed instructions (*see* Exhibit A hereto, second to last instruction),
20 and fully covers the statutory damages award in a neutral, clear, concise manner.
21 Defendants' proposed separate instructions are incomplete and should be rejected.

22 Defendants' contentions:

23 This instruction represents an accurate statement of the law.

24 **Tab 24:**

25 Plaintiffs' contentions: Defendants' proposed instruction on foreign profits is
26 ambiguous because it is not specific to each party. The instruction does not make
27 clear that the foreign profits of a particular Plaintiff are recoverable only if that
28 particular Plaintiff committed an infringing act entirely in the United States that